

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
A & V CROWN, INC.	:	DETERMINATION
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period March 1, 1979	:	
through May 31, 1982.	:	

Petitioner, A & V Crown, Inc., 853 West Sunrise Highway, Bellmore, New York 11710, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1979 through May 31, 1982 (File No. 805251).

A hearing was commenced before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on July 11, 1989 at 1:15 P.M., with all additional evidence and briefs to be submitted by October 16, 1989. Petitioner appeared by Allen Kramer, Esq. The Division of Taxation appeared by William F. Collins, Esq., (Carroll R. Jenkins, Esq., of counsel).

ISSUE

Whether petitioner established that it had reasonable cause for its failure to report and pay over sales taxes when due.

FINDINGS OF FACT

On April 20, 1983, the Division of Taxation ("Division") issued to petitioner, A & V Crown, Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period March 1, 1979 through May 31, 1982, assessing tax due of \$30,921.76, plus penalty of \$7,094.87 and interest of \$9,103.71, for a total amount due of \$47,120.34. Al Votta, president of A & V Crown, had previously signed a consent extending the period of limitation for assessment of sales and use taxes for the period March 1, 1979 through February 28, 1980 to June 20, 1983.

At the administrative hearing, petitioner conceded the tax due as assessed by the Division. Petitioner and the Division consented to have the sole remaining issue, whether penalty should be abated, determined on submission of documents without hearing.

At the commencement of the audit, Mr. Votta was contacted by the auditor, and he referred the auditor to petitioner's accountant, Steven Schissler. Petitioner's sales tax returns for the audit period were prepared by Mr. Schissler who also represented petitioner throughout the field audit which resulted in the issuance of the notice under consideration here.

The auditor's notes show that Mr. Schissler often failed to return her phone calls and that he canceled numerous appointments with the auditor. On June 7, 1982, August 24, 1982 and September 1, 1982, the auditor spoke directly to Mr. Votta who each time assured her that he would have Mr. Schissler contact her. A Statement of Proposed Audit Adjustment was issued to petitioner in December 1982. By letter dated December 31, 1982, Mr. Schissler registered petitioner's disagreement with the audit findings. The auditor then attempted to schedule an informal conference with Mr. Schissler to discuss the audit findings, but she was unable to do so because of his lack of cooperativeness.

On January 10, 1983, while the field audit was being conducted, a warrant was entered against petitioner for sales tax, penalty and interest due in the amount of \$44,993.78. The taxable periods covered by the warrant correspond to periods within the audit period, but the warrant was in no way related to the field audit which was then being conducted. As a result of the issuance of the warrant, petitioner entered into a payment plan with the Division. Approximately, four months after this warrant was issued, the notice in question here was issued to petitioner.

A timely petition was filed protesting the statutory notice, and a conciliation conference was conducted by the former Tax Appeals Bureau. As no settlement was reached, petitioner was directed to file a perfected petition. The perfected petition was not filed in the period allowed for filing; therefore, on May 1, 1985, the former State Tax Commission issued a default order against petitioner. A copy of the default order was sent to petitioner.

In May 1987, Mr. Schissler was incarcerated. The nature of his crime is not in the record. He died in prison in August 1987.

On September 18, 1987, a warrant was docketed against petitioner for various unpaid tax assessments, including the one at issue here. At this time, petitioner obtained a second accountant, Mr. Gary Zucker.

At Mr. Zucker's request, the default order issued against petitioner was vacated, and the instant proceeding ensued. Mr. Zucker tried but was unable to procure petitioner's financial records from Mr. Schissler's estate. As a result, petitioner was unable to present any evidence to challenge the tax assessment at issue.

SUMMARY OF PETITIONER'S POSITION

Petitioner's position is that it has shown reasonable cause for its failure to accurately report and pay over sales taxes due. In an affidavit, Mr. Votta alleges that he relied on Mr. Schissler to represent him on all matters before the Division and was not aware that the instant matter remained unresolved until the issuance of the second warrant in September 1987. He states that he believed the warrant issued in 1983 covered all taxes due for the periods included in the warrant, including the taxes later assessed by notice of determination. Since he was making regular payments of tax to the Division, Mr. Votta assumed that the instant matter had been resolved. Petitioner argues that its inability to obtain its records from Mr. Schissler's estate precluded it from challenging the instant assessment and that this, coupled with Mr. Schissler's failure to provide petitioner with competent representation at the time of the audit and conciliation conference, constitutes reasonable cause.

CONCLUSIONS OF LAW

A. Tax Law § 1145(a) provides that any person failing to file a return or to pay over any

tax within the time required by or pursuant to article 28 shall be subject to penalty and statutory interest. If it is shown that such failure or delay was due to reasonable cause and was not due to willful neglect, all or a portion of the penalty and that portion of the interest which exceeds the minimum may be abated (Tax Law § 1145[a][1][iii], as renum by L 1985, ch 65, § 86). For the period of the audit, the Division's regulations included within the boundaries of reasonable cause "any...cause for delinquency which appears to a person of ordinary prudence and intelligence as a reasonable cause for delay in filing a return and which clearly indicates an absence of gross negligence or willful intent to disobey the taxing statutes" (20 NYCRR former 536.1).

B. Petitioner has not established that it had reasonable cause for its failure to comply with the Tax Law. Mere reliance on an accountant is not sufficient to establish reasonable cause. Petitioner provided no facts regarding the manner in which its sales were recorded and its tax returns were prepared or any other evidence to show that it made a reasonable effort to ascertain and pay its sales tax liability. Mr. Votta may have been unaware that tax assessed pursuant to the notice at issue here remained unpaid. But even if he believed that the payment agreement he had entered into included the tax, penalty and interest assessed by the notice under consideration, that belief does not establish reasonable cause for petitioner's initial failure to report sales tax when due.

C. The petition of A & V Crown is denied in all respects.

DATED: Troy, New York
October 26, 1989

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE